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ESTOPPEL IN AFFORDING OPPORTUNITY FOR CRIME WHEREBY THIRD PARTY IS DEFRAUDED.

New York Court of Appeals applies to its utmost verge the principle that no act whereby a third party may be defrauded by means of the perpetration of a crime by another is to be considered negligence by the doer of the act. People's Trust Co. v. Smith, 109 N. E. 561.

But the principle in its furthest reach may not be said to relieve the affording of such opportunity by one to another, whom the former has any good reason to suspect as not being entitled to have trust and confidence reposed in him. When you admit one exception to the rule that negligence to be deemed actionable should not anticipate the commission of crime by another, which may result in injury to an innocent third party, the inquiry then becomes not so much the soundness of the general principle, as what may constitute cases of exception thereto.

The case above cited was where an uncle of the same name as his nephew left in the latter's custody, merely for safekeeping, a bond and mortgage. These were not accompanied by any blank form of transfer signed by the mortgagee, and there was nothing to indicate that any transfer was contemplated. The nephew executed in his own handwriting an assignment of the bond and mortgage and delivered them to plaintiff bank as security for a loan. It was held that the true owner of the bond and mortgage was not estopped to claim that there was no valid pledge to plaintiff.

The court said: "The nature of this transaction did not charge the owner with any duty to the public. It is true, of course, in a broad sense that by intrusting his bond and mortgage to the nephew he made possible the fraud. That would be equally true if he had intrusted the nephew with the custody of diamonds. Indeed, the wrongful sale of diamonds, passing, as they do, from hand to hand, is probably the easier crime and one more readily to be foreseen. But the mere possession of a chattel with the permission of the owner does not enable the possessor to transfer a title by estoppel. What is true of a chattel is true equally of things in action."

This statement needs to be examined. Thus it has been held that possession is *prima facie* evidence of ownership and, if this be true, then transfer of personal property in one's possession is *prima facie* correct. The books abound with distinctions regarding *indicia* of ownership and possession of property is ranked so greatly as to ripen into title as between parties and their privies. Shall we concede all of this and yet deny that estoppel may arise against one who permits the possessor of his property to be clothed with the *indicia* of title and not be responsible for his breaches of trust?

It is hard to distinguish a case like the one we are considering from that of possession of any other article of personal property, where the custodian is clothed with ordinary *indicia* of ownership. The fact that he must commit a felony in order to transfer apparent title to another presents little in the way of distinction. If vested with the apparent title to diamonds, he may be guilty of embezzlement in disposing of them to another, but, if he has apparent title, he conveys it. Why distinguish between embezzlement and forgery, so far as an innocent third party is concerned?

All of these questions should be resolved not upon technical lines, but upon the broad line of making one responsible, where one of two innocent parties must suffer, whose act afforded, not the contemplated, but the possible result. A possible result may be contemplated as well as a probable result, that is to say as being within the domain of possibility.

Anyone could foresee, that it was possible for a third party to be made to suffer, if the owner was to be acquitted of every shade of wrong, in such circumstances as this case presents. If he had a reasonable cause to suppose his nephew might betray his trust, he surely would have to stand the consequences of that betrayal. Shall his personal confidence, howsoever justified, allow him to hold out such a temptation as was shown in this case, and especially when custody vested the possessor with apparent title?

NOTES OF IMPORTANT DECISIONS.

BULK SALES LAW—BILL OF SALE OF PROPERTY TO SATISFY A CHATTEL MORTGAGE.—In 81 Cent. L. J., 92, we called attention to a seeming infirmity in bulk sales laws as not covering the case of a trader giving a chattel mortgage on his stock. The question was not decided in the case there cited, but the ruling of the trial court, to the effect that the statute did not apply, was held unnecessary to be reviewed in the case. We called attention there to the great importance of such a question.

The Supreme Court of Washington does hold squarely, however, that, where a trader makes a bill of sale to mortgagee under a chattel mortgage in settlement of the indebtedness secured thereby, the bulk sales law does not apply to such a transaction, Daniels v. Pac. Brewing & M. Co., 150 Pac. 609.

The court said: "In Peterson v. Doak, 43 Wash. 251, 86 Pac. 663, we held that a debtor may transfer a stock of goods in bulk to his creditor without complying with the Sales in Bulk Act, when no purchase money passes, as there is in fact no sale within the meaning of the act."

It is taken for granted in such a ruling, that the giving of a chattel mortgage is itself proper and, this being true, the Bulk Sales Act ought not to interfere in any way with honest agreements for its discharge. But is it true, that the giving of a chattel mortgage lies outside of the purview of the Bulk Sales Act? If so, then, if there is consideration for the chattel mortgage, it would seem to be without fraud for it to be given by a trader who though insolvent may prefer his creditors and for the very purpose of avoiding the operation of the Bulk Sales Act. As long as an act is legal, it makes no difference what are the motives for its commission.

WITNESSES—CALLING AS VOUCHING FOR RELIABILITY WHEN WITNESS IS RECALLED BY ADVERSARY.—New York Court of Appeals holds, that, though an employe of defendant is called by plaintiff to testify as to a necessary fact in the making out of his case, his character cannot be impeached when he is also called by defendant, notwithstanding the fact of his interest to maintain defendant's defense, and further that no jury question is presented as to the truth of his testimony for defendant, where it is not inherently improbable and is not contradicted by other evidence in the case. Carlisle v. Norris, 215 N. Y. 400, 109 N. E. 564.

The rule which is laid down by Mr. Greenleaf states a general principle and is founded on the presumption that the party calling a witness has at least some option whether or not he shall be called. It is extending the rule a considerable length to say it ought to be enforced in such a case as was before the New York court.

In that case the action was by plaintiff against his broker for an accounting in a relationship involving trust and confidence reposed by plaintiff. He was compelled to call defendant's employe—his confidential man—and very naturally he would confine the information sought from him to as narrow a point as possible. An exigency in a case of this nature would seem to demand a mitigation of the general rule, or, if recognized as an aid to general justice, it should not be used to its subversion. As has been well said by Justice Holmes: "The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law," and the maxim cessat lex cessante ratione legis is eminently proper in the application of those rules. In this case plaintiff's necessities were made to operate altogether in defendant's favor. The rule properly interpreted should apply only to a witness presumed to be indifferent between the parties and not to one who is presumed to be hostile to the party calling him, but who must call him by way of purging the conscience of the other party. It is in the court's discretion to allow a party calling a hostile witness to cross-examine him and this rule goes upon the theory that the witness is not vouched for.

THE FEDERAL TRADE COMMISSION.—PART III. — PROVISIONS OF CLAYTON BILL AFFECTING THE FEDERAL TRADE COMMISSION.*

Clayton Bill.—The Clayton bill was passed after the Trade Commission bill, but it was a part of the same anti-trust program of the administration. It places under the judicial powers of the Federal Trade Commission four specific practices in interstate commerce which it expressly declares to be unlawful. These four practices may or may not be "unfair methods of competition." It is not left to the Commission or to a court to say whether they are or are not. They are declared by the Clayton bill to be unlawful and the Federal Trade Commission is expressly given the power to see that these sections of the Clayton bill are complied with by persons and corporations engaged in interstate commerce, other than banks and railroads. The procedure is the same as under the Federal Trade Commission Law, § 5, for preventing the use of unfair methods of competition.

These four practices forbidden by the Clayton bill are as follows:

(a) By § 2 of the Clayton Law it is declared unlawful to discriminate in price between different purchasers of commodities sold for use in the United States, "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce," *provided* that nothing in the Act should prevent discrimination on account of difference in quality or quantity or difference in the cost of selling or transportation, or difference made in good faith to meet competition; and *provided further*, that nothing in the Act should prevent persons "from selecting their own customers in *bona fide* transactions and not in restraint of trade." This is to make local price cutting unlawful when engaged in with the effect of restraining trade or tending to create a monopoly.

(b) Section 3 of the Clayton Law forbids what are called "tying contracts," that is, contracts by which one makes a sale or lease of goods, whether patented or unpatented, for use in the United States, with the agreement that the lessee or purchaser shall not use or deal in the goods of a competitor of the lessor or seller, where the effect of such agreement "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." This Act does not forbid the purchaser of the goods from exacting a contract from the seller that he will not sell to anyone else. All the acts forbidden by this section were probably already forbidden by the Sherman Law, but the Clayton Law empowers the Federal Trade Commission to prevent these tying contracts.

(c) The Clayton Law, § 8, provides that after two years from its approval (which was October 15, 1914) no person should be at the same time "a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than one million dollars, engaged in whole or in part in (interstate) commerce," other than banks and railroads, if such corporations are competitors "so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the anti-trust laws."

(d) Section 7 of the Clayton bill provides that no corporation engaged in interstate commerce shall acquire the whole or any part of the capital of another corporation engaged in such commerce where the effect may be to substantially lessen competition between the two corporations or to restrain commerce or tend to create a monopoly. It also forbids holding companies by providing that no corporation shall acquire the whole or any part of the stock of two or more corporations engaged in commerce where the effect of such acquisition or the use of such stock may be to substantially lessen competition between such corporations or any of them whose stock is so ac-

*Parts I and II of this article appeared in the two preceding issues.

quired or to restrain commerce or tend to create a monopoly.

All of these four classes of acts which tend to restrain interstate commerce are declared unlawful by the Clayton bill and authority is vested in the Federal Trade Commission to prevent them.[1]

Powers of Federal Trade Commission to Make Examinations and to Compel Testimony.—The powers of the Trade Commission to obtain testimony are contained in the first sentence of § 9 of the bill, which provides as follows:

"That for the purposes of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any *corporation* being *investigated or* proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all *such* documentary evidence relating to any matter under investigation."

In § 4 of the Act, it is provided as follows:

" 'Documentary evidence' means all documents, papers and *correspondence* in existence at and after the passage of this Act."

The sentence quoted from § 9 is in two parts. The part before the semicolon gives the right of *examination* of documents, papers and correspondence. The part following the semicolon gives the right to require the production of evidence, oral or written, under subpoena. Questions arise under each part of the sentence.

Right to Examine "Documentary Evidence."—It should first be observed that the right of *examination* is conferred only respecting the documentary evidence of *corporations,* not of individuals or partnerships. The right of examination may be exercised by Congress over a corporation by reason of its power of visitation, even though an individual could not lawfully be subjected to such interference.[2]

(a) It is claimed that this right is conferred in such broad terms as to amount to an unreasonable search under the Fourth Amendment to the Constitution of the United States,[3] and Hale v. Henkel,[4] is relied on holding that a corporation is entitled to the protection afforded by this amendment against *unreasonable* search.

In that case the grand jury was investigating whether the Sherman Law had been violated by the MacAndrews & Forbes Co., of which the witness was an officer. A *subpoena duces tecum* was issued against the witness, commanding him to bring the books and papers described of the corporation before the grand jury. The Supreme Court held[5]—

"that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum,* the production, upon a trial in court, of documentary evidence."

But the court held that the subpoena in this case was too broad, saying:

"Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from

(1) The Clayton Bill in §§ 15 and 16 authorizes suits by the Attorney-General and by injured individuals to enjoin the acts which the bill empowers the Trade Commission to prevent. Can such suits, or actions at law for injuries from such acts, or from "unfair methods of competition," be maintained in the courts before the Commission has first decided that the act or method which is the basis of the suit or action is in violation of law? In other words, will the court apply to the Federal Trade Commission the principles of Texas & P. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426?

(2) Hale v. Henkel, 201 U. S., at pp. 74-75.

(3) This view is maintained in an article by Mr. Edward S. Jouett, General Attorney of the L. & N. Railroad, in 2 Virginia Law Review 584 (May, 1915).

(4) 201 U. S. 43, 76.

(5) 201 U. S., at p. 73.

the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the union.

"If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company."

However, in the later case of Wheeler v. U. S.,[6] the Supreme Court sustained a subpoena addressed to Wheeler & Shaw, Inc., a corporation doing business at Boston, and calling upon that corporation to produce before the grand jury—

"all cash books, ledgers, journals and other books of account of said Wheeler & Shaw, Inc., for and covering the period between October 1, 1909, and January 1, 1911, all copies of letters and telegrams of Wheeler & Shaw, Inc., signed or purporting to be signed by said Wheeler & Shaw, Inc., or by its president or treasurer in behalf of said Wheeler & Shaw, Inc., during the months of October, November and December, 1909, and the entire year of 1910."

This subpoena called for *all* the books and *all* the letters and telegrams signed by the corporation for a period of fifteen months, yet the court said:

"There is nothing to show it (the subpoena) was so broad as to be objectionable, as was indicated of the subpoena in Hale v. Henkel, 201 U. S. 43."

If this subpoena did not constitute an unreasonable search, it cannot be claimed that the right "at all reasonable times" to examine all the papers of the corporation which the Trade Commission Law confers is unreasonable, in the light of the visitorial power over corporations, declared in Hale v. Henkel, to be vested in Congress. The statute will not be construed to mean that the examiners may entirely exclude the corporation from all its books and papers at the same time, so that it would put a stop to the company's business, as in Hale v. Henkel. It will be construed to authorize examination, not only at "reasonable times," as expressly provided, but also in a reasonable manner as impliedly provided; and such an examination by the Commission's agents at the corporation's office would be less unreasonable than the production of the books and papers away from its office before a grand jury, as in Wheeler v. U. S., especially when the grand jury might be 3,000 miles from the corporation's place of business.

That such examination of corporate books and papers if authorized by statute will not be deemed unconstitutional is clearly intimated in Hale v. Henkel. The Supreme Court first called attention to the difference between the position of an individual and that of a corporation by reason of the visitorial power of the legislature over the latter:[7]

"Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. * * * Among his rights are a refusal to incriminate himself, and the immunity of himself and his *property* from arrest or *seizure* except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of the state. * * * Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and de-

(6) 226 U. S. 478.

(7) 201 U. S. 74-75.

mand the production of the corporate books and papers for that purpose. * * *

"It is true that the corporation in this case was chartered under the laws of New Jersey, and that it received its franchise from the legislature of that state; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to repudiate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchise vested in it by the laws of the state. *The powers of the general government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an Act of Congress.*"

That an Act of Congress authorizing an examination of all the records of corporations engaged in interstate commerce will be upheld is foreshadowed by the concluding words of the opinion in Hale v. Henkel, where, after saying that the subpoena in that case was too sweeping, the supreme court said:

"Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, *if duly authorized by Act of Congress*, would constitute an unreasonable search and seizure within the Fourth Amendment."

What this appears to intimate is that, in view of the visitorial power of Congress over corporations engaged in interstate commerce, an Act of Congress authorizing an examination of all the records of such corporations is a fit and appropriate mode for the regulation of that commerce by corporations, within the principles of McCulloch v. Maryland.[8]

(b) Has the Commission right of access, for examination and copy, to the *correspondence* of the corporations? In the case of U. S. v. L. & N. R. R.,[9] decided by the Supreme Court February 23, 1915, it was held that under a statute giving the Interstate Commerce Commission "access to all accounts, records and memoranda kept by carriers," the Commission was not entitled to have access to the *correspondence* of the carrier. But as § 4 of the Federal Trade Commission Law expressly defines the term "documentary evidence" to include correspondence, the Federal Trade Commission undoubtedly will be entitled to have access for examination and copy to the documents, papers *and correspondence* in existence at and after the law was passed, of any *corporation*, whether it is being proceeded against under § 5 or merely investigated under § 6. This would probably not include confidential correspondence with counsel.[10] The Commission will not have access to and the right of inspection without subpoena of the documentary evidence of individuals.

(c) Documentary evidence is defined as "all documents, papers and correspondence." Does this include books of account? The Supreme Court construes strictly words investing such commissions with the power to compel testimony. This justifies the contention that these words do not include books of account.

Right to Require Production of Evidence by Subpoena. — (a) Respecting this branch of the question, the Federal Trade Commission seems to have the right to require by subpoena the production of testimony only where specific cases are before it for adjudication under the power granted it by § 5 of the law, and possibly also in the investigation of specific matters which *might have been* so brought before it, but not where it is merely making a general administrative investigation under § 6. The decision of the Supreme Court in Harriman v. Interstate Commerce Commission,[11] seems controlling.

(8) 4 Wheat., 316, 421, and Lottery Cases, 188 U. S. 321, 354-355.

(9) U. S. Adv. Ops., 1914, p. 363.
(10) See U. S. v. L. & N., supra.
(11) 211 U. S. 407.

That case arose under the Interstate Commerce Act. The Interstate Commerce Commission is given authority to inquire into the management of the business of all common carriers subject to the provisions of the Act and the right to obtain from them full and complete information necessary to enable the Commission to perform its duties. It is also required to recommend to Congress each year additional legislation as it thinks necessary. In addition, the Interstate Commerce Commission is given the power to hear and decide specific complaints. In 1906, the Commission ordered an investigation of the general subject of consolidations and combinations of carriers. The witness Harriman was asked several questions which he declined to answer and the question was whether he could be compelled to do so. The clause of the Interstate Commerce Act relating to the production of evidence is as follows:

"*For the purposes of this Act* the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

It was argued for the Commission that one of the "purposes of this Act" was that the Commission should keep itself informed as to the business of carriers, and another, that it should recommend additional legislation to Congress, and that for either of these general objects, it might require the witness to testify. The Supreme Court said, however:

"We are of opinion on the contrary that the purposes of the Act for which the Commission may exact evidence embrace only complaints for violation of the Act, and investigations by the Commission upon matters that might have been made the object of complaint. As we already have implied, the main purpose of the Act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary —those where the investigations concern a specific branch of the law."

This case appears to control the rights of the Federal Trade Commission. It could not, by subpoena, compel the production of evidence in aid of its general investigations under § 6 but only in aid of a specific proceeding under § 5, or in aid of an investigation being made by it of a method of unfair competition which might have been the subject of a specific proceeding. The language of the section giving the Federal Trade Commission the power to compel the production of testimony is so nearly identical with the language of the Interstate Commerce law construed in the Harriman case that the decision in that case must control here.

It is true that the first part of the sentence quoted above from § 9 of the Act gives the right of *examination* of documentary evidence "of any *corporation* being *investigated or* proceeded against," but there is nothing in the second part of the sentence —the part conferring the right to compel evidence by *subpoena*—which permits the words "investigated or proceeded against" to be imported into it. The second part of the sentence does require the production of "*such* documentary evidence" and this might import a reference to the same documentary evidence described in the first part, viz., the documentary evidence of corporations being "investigated" as well as of those being proceeded against. But this construction cannot be adopted, because it would at the same time necessarily limit the production required to the documentary evidence of *corporations*, and so would be in conflict with the manifest purpose of the law, which, having given in § 5 the authority to prevent unfair methods of competition by *person, partnerships* or corporations, must have meant in § 9 to authorize the produc-

tion by subpoena of documentary evidence against the persons and partnerships as well as against the corporations.[11a]

(b) Another question that arises in connection with the production of evidence by subpoena concerns the right of a witness to immunity. The most conspicuous performance of the Bureau of Corporations in its career was the investigation of the Chicago Beef Packers. The law creating the Bureau of Corporations gave it the same power to compel the production of testimony as was conferred on the Interstate Commerce Commission and it provided the same immunity for witnesses as was provided by the Act of February 11, 1893. The Commissioner of Corporations went to Chicago and called on the packers. He notified them that he had come pursuant to a resolution of the House of Representatives to investigate the cause of the low price of beef cattle and whether it was due to violations of the Sherman Law, and he asked them to submit their books and records for examination. The defendants gave the Commissioner access to their books and papers and also gave him certain information in writing as to the conduct of their business, which he requested from them. None of the witnesses were sworn nor was any subpoena issued for any of them. Subsequently the defendants were indicted for a violation of the Sherman Law and they pleaded that, under the Act of February 11, 1893, they were entitled to immunity because of the evidence they had thus given to the Commissioner of Corporations. The District Court of the Northern District of Illinois, Judge Humphrey, held that the plea was good and the defendants were entitled to immunity, although they had been neither subpoenaed nor sworn. U. S. v. Armour.[12] This decision was rendered March 21, 1906. Immediately thereafter, Congress passed an Act, which was approved June 30, 1906, providing that the immunity should—

"extend only to a natural person, who, in obedience to a subpoena, gives testimony under oath, or produces evidence, documentary or otherwise, under oath."

Only a part of this Act of 1906 has been adopted in the immunity clause of the Federal Trade Commission bill. Immunity is given only to a witness who testifies in obedience to a *subpoena* issued by the Commission, but it is *not* required as a condition of immunity that his testimony be given under *oath*.[13]

Conclusion.—The question of restraining competition is an economic one. The opinion of the community varies from time to time as to whether monopoly or competition is best. The law will reflect the opinion of the time. In early times, monopoly was the rule. "Local trading and distant commerce were in the hands of the guilds merchant and trading companies, each with an extensive monopoly." Professor Wyman has been "rummaging in the dust-bin of precedent" and he produces from the Year Book of 11 Henry IV, in 1410, a case which he says appears to have been the turning point in our law. I state it in his language:

"The masters of a grammar school of Gloucester brought a writ of trespass against another master, and counted that the defendant had started a school in the same town, so that whereas the plaintiffs had formerly received 40d. a quarter from each child, now they only got 12d., to their damage. The counsel for plaintiffs contended that this interference shown and this

(11a) In the fifth paragraph of § 9 are these words:

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation."

These words can hardly be construed to enlarge the authority to extort evidence by subpoena, which is contained in the opening sentence of § 9, and there only. To construe the words quoted as an attempt to empower the Commission to extort evidence by subpoena in its general investigations under § 6 would present "the constitutional difficulty in most acute form," which the Supreme Court avoided in the Harriman case. It is believed it will likewise be avoided here, by construing these words not to enlarge the power to extort evidence already granted, but merely to provide that wherever that power exists the evidence may be required by deposition, as well as in person before the Commission.

(12) 142 Fed. 808.

(13) § 9, last paragraph.

damage proved made a good action on the case; he cited many instances of exclusive rights, including the claim of the masters of Paul's that there should be no other masters in all London except themselves. But Justice Hill said that there was no ground to maintain this action, since the plaintiffs had no estate, but a ministry for the time; and though another equally competent with the plaintiffs came to teach the children, 'this was a virtuous and charitable thing, and an ease to the people, for which he could not be punished by the law.'"

That was five hundred years ago and the pendulum has been swinging in the direction of unrestricted competition ever since. The modern rule was very well stated by Judge Bennett in the case of Anderson v. Jett, decided in 1889, the year before the Sherman Law, and reported in 89 Ky. 375. He said:

"Rivalry is the life of trade; the thrift and welfare of the people depend upon it; monopoly is opposed to it all along the line; the accumulation of wealth out of the brow-sweat of honest toilers by means of combinations is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift and enterprise among all the citizens of the commonwealth, and is opposed to monopolies and combinations because unfriendly to such fairdealing, thrift and enterprise, declare all combinations whose *object* is to destroy or impede free competitions between the several lines of business engaged in, utterly void. The combination or agreement, whether or not in the particular instance it has the desired *effect*, is void."

The question is whether this Trade Commission is going to mark a beginning of the swing of the pendulum in the other direction. In its reports on trade conditions with foreign countries where combinations of merchants or manufacturers may affect the foreign trade of the United States, will the Commission suggest that for the purposes of foreign trade, our manufacturers may be permitted to suppress competition among themselves and to make combinations? In its reports on the practices of corporations engaged in interstate commerce, if it discovers a practice of contracts to maintain prices and finds the same necessary to enable the parties to make a reasonable profit, will it recommend that such contracts be allowed, although they have been pronounced by the supreme court to be in violation of the Sherman Law? All these questions time alone can answer.

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BANKS AND BANKING — DEATH OF DEPOSITOR.

ELGIN v. GROSS-KELLY & CO.

(Supreme Court of New Mexico. July 8, 1915.)
150 Pac. 922.

(Syllabus by the Court.)

To the extent that a bank check works an assignment pro tanto of a fund on deposit, the death of the depositor will not revoke the authority of the bank to pay the check, which has been given for a valuable consideration, and is therefore coupled with an interest.

Appellee contends that the greatest weight of authority is to the effect that a check does not operate as an assignment of the fund, but is a mere request to pay, and vests the payee with no interest in the deposit or right against the bank until the bank has accepted the check. Appellee refers us to section 189 of our Negotiable Instruments Act, in support of this contention, and as absolutely settling the question in this jurisdiction. Section 189 is as follows:

"A check of itself does not operate as an assignment on any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check." Section 189, c 83, Laws of 1907.

They contend further in this respect that, except in those jurisdictions where the execution and delivery of a check operates as an assignment pro tanto of the deposit, it necessarily follows, as a matter of course, that upon the death of the depositor the bank is indebted to his estate to the amount of the deposit then on its books, and cannot, therefore, change its relation or its liability to the estate, with the exception that it will be protected where it pays a check without notice of the death of the depositor.

The case of Tate v. Hilbert, 2 Ves. Jr. 118, 30 Eng. Report Rep. 548, is cited in support of this contention, and it is to be found that this case has been largely relied upon by other American authorities, but, as we be-

lieve, the rule announced in said case has been misapplied.

Appellee, in the case under consideration, contends that the English case of Tate v. Hilbert held that, where a bank pays a check after the death of a depositor and maker of the check and with notice of his death, it is liable to the administrator in the amount so paid, upon the ground that the death of the maker or drawer of the check terminated the right of the bank to pay out the money and to that extent revoked the check. In commenting upon this English case the District Court of Appeals of the Third Judicial District of California quoted from Daniel on Negotiable Instruments with approval as follows:

"The English case above referred to does not determine, as has been supposed, that, where a check is given for value, the authority of the banker to pay is revoked. The death of the drawer of an ordinary bill of exchange does not revoke it, and we can discern no principle of law which allows the death of the drawer to affect the rights of a checkholder who has given value for it." Nassano v. Tuolumne County Bank et al., 20 Cal. App. 603, 130 Pac. 29.

The case of Tate v. Hilbert, supra, as we read it, simply held that the giving of a check on a bank payable to the bearer was not a valid donatio mortis causa or an appointment or disposition in the nature of it. In that case the deceased person had given a niece a certain check as a gift, which, however, was not presented before the death of the maker, the niece bringing her action against defendant as executor of the estate of the deceased. The Lord Chancellor in his opinion, among other things, said:

"There is no doubt that in this case the transaction is fair. If it fails, it is a case of mistake upon the part of the person meaning to give, and also a mistake or delicacy upon the part of a person to whom the gift was made; as, if she had paid this away either for valuable consideration or in discharging a debt of her own, it would have been good, or, even if she had received it immediately after the death of the testator and before the bank was apprised of it, I am inclined to think no court would have taken it from her."

This quotation from the English case is pointed out for the sole purpose of showing that the case is not authority for the contention of appellee that the death of the maker of the check is an absolute and unqualified revocation thereof, and that appellee has misapprehended the interpretation of the case.

In commenting upon the same case Mr. Daniel, in his work on Negotiable Instruments (volume 2, § 1618b), says:

"Whether Death of Drawer Revokes Check.—The death of a drawer of a check, as is stated by many authorities, operates as a revocation of the authority of the bank or banker upon which it is drawn to pay it; and, though it is conceded that if the bank or banker pay the check before notice of the death, the payment is valid, otherwise, it has been considered, it is not. This view has been generally based upon the decision in the English case of Tate v. Hilbert, where it was held that the gift of a common check on a banker payable to bearer was not a valid donatio mortis causa, or an appointment or disposition in the nature of it. It is quite true that authority to an agent is revoked, as a general rule, by death of the principal; but this doctrine is qualified by the equally well settled principle that, if the authority be coupled with an interest in the thing vested in the agent, the death of the principle operates no revocation. Now, where a check is given to the payee for a valuable consideration (and the check imports value), the authority to the payee to collect the amount from the bank is coupled with a vested interest in the check. He can sue the drawer upon the check if it be dishonored. The drawing of the check without funds to meet it is a fraud, and the English case above referred to does not determine, as has been supposed, that when a check is given for value the authority of the banker to pay is revoked. The death of the drawer of an ordinary bill of exchange does not revoke it, and we can discern no principle of law which allows the death of the drawer to affect the rights of a checkholder who has given value for it. The idea that the death of the drawer of a check given to the payee for value operates a revocation is, as it seems to us, a total misconception of the law. For a check is a negotiable instrument as often, if not more frequently, given for value than any other species of commercial paper. The drawer is deemed the principal debtor; and it is anomalous to hold that his death in any wise lessens his obligations or the right of the bank to pay it, when given for value."

The one case cited by appellant which in any real sense of the word is analogous in point of fact to the case now under consideration is that of McMurray, Administrator, v. Ennis (City Ct. Brook.) 10 N. Y. Supp. 698, in which case it was held that an administrator of a solvent estate cannot recover moneys

obtained from the bank after deceased's death upon a check given by him a few days before death in payment of debts, though the holder knew of his death and failed to inform the bank thereof. This case is so nearly in point and the reasoning thereof makes so strong an appeal to our minds that e deem it wise to quote at length from this opinion:

"The trial court, at the request of both parties, and without objection or exception of either, found that Lawrence Ennis, a few days before his death, delivered, for valuable consideration, checks for $1,200 drawn by him to the order of the defendant, Teresa Ennis, which checks she had cashed at the bank a few days after his death, without disclosing his death. This is an action by his administratrix to recover from defendant such sum for money had and received by her to plaintiff's use. Judgment was rendered in favor of plaintiff, from which defendant appeals. There is no controverted question of fact raised by either party, and there is no intimation that the estate of Ennis is insolvent. This appeal presents to us a single question of law, viz.: If a debtor, a few days before his death, delivers, in payment of his indebtedness, his own check to the order of his creditor, who a few days after such death receives from the bank the money on the same without informing the bank of the death, can the administratrix of such dead debtor recover the sum so received by the creditor, when the estate is not shown to be insolvent? Strange to say, an apparently thorough research fails to disclose either an English or American authority adjudicating this point. This would indicate either that such a case seldom occurs, or, if it frequently occurs in actual practice, the business mind, at least, has acquiesced in the regularity and justice thereof. When we consider the universal use of the bank check to transfer money from debtor to creditor in this country and England, in the transaction of the immense volume of commercial, mercantile, and other business, requiring millions of checks in each year, the conviction is irresistible that it daily occurs that at the death of debtors their checks to order of creditors are uncollected in the hands of creditors, or in the mail for them, or on deposit with banks or bankers, or in the mail after such deposit, for collection. The well-known diligence and alertness of creditors engaged in every branch of business renders it certain that in daily practice checks of deceased debtors in the possession of creditors are paid by the banks until such banks are actually informed of death of the drawers. Any other rule would do much to clog the wheels of business, and bank checks would fall into disuse; for banks would not pay them unless they had actual information that the drawers were alive, and creditors in cash transactions would not receive payment by check. What we deem to be the existing practice should be upheld in the interest of the business public, creditors, banks, and debtors, unless to do so would violate some established rule of law. The doctrine evolved from such a practice antagonizes no express adjudication on the exact point. Respondent suggests that it is hostile to the principle of proportionate equality of creditors in the assets of a dead debtor. The answer to that objection is that the infringement of such right is not involved in this case, for there is not the slightest intimation in the evidence that the Ennis estate is insolvent. Then, again, the doctrine, so far as it applies to the cause at bar, is in perfect harmony with the equally well established rule that creditors of the solvent estate of a deceased debtor are entitled to be paid in full. Defendant has not exceeded her right in that respect. Respondent laid some stress on the rule that death revokes the authority of an agent, but he overlooked the modification or exception thereto. A creditor receiving from a debtor a check in payment of his claim, it is an authority coupled with an interest, viz., to receive the money from the bank, if it will pay the same, and retain the money as his own. Such an authority death never revokes. Respondent chiefly rests his right to recovery on the theory that death vests all the personal property of the intestate instanter in his administratrix. This is only partially true. It is not vested absolutely in her to do with as she pleases, but rather in trust to pay the debts due the creditors in full, if sufficient. The most that can be said in this case is that such trust has executed itself, so far as defendant is concerned, by virtue of the particular circumstances surrounding the transaction, without active intervention of the administratrix. The contention of appellant does not, in our opinion, invade, harmfully at least, any of the established principles of our law.

"The action for money had and received to the use of another is in its nature a purely equitable action, and can never be maintained unless, according to a natural justice and equity, the plaintiff is entitled to the money as against the defendant. It admits of any defense which shows the plaintiff ought not, in good conscience, to recover. 'In one word, the gist of this kind of action is that the defendant, upon

the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money.' Moses v. Macferlan, 2 Burrows, 1010, 1012; Bank v. Raymond, 3 Wend. [N. Y.] 69, 74; Eddy v. Smith, 13 Wend. [N. Y.] 489. 'Whether the defendant could sue at law, in his own name, to recover the money, or whether, having fairly got it, this action for money had and received to the plaintiff's use can be maintained, are very different questions. This is an equitable action, which may be defended upon the same equitable principles as those upon which it is maintained. As a general rule, the question is: To which party ex æquo et bono does the money belong?'"

Upon the same subject of the effect of the death of the drawer upon a bill of exchange we find Mr. Daniel, in his work on Negotiable Instruments (volume 1, § 498a), using the following language:

"The death of the drawer is no revocation of a bill if it has been delivered to the payee, and the drawee may accept and pay it. 'The death of the drawer,' says Parsons, 'is no objection whatever to an ordinary acceptance by the drawer, whether with or without knowledge, for the death is no revocation of the bill if it has passed into the hands of the holder for value.'"

See, also, Cutts v. Perkins, 12 Mass. 206; Morse on Banks and Banking, § 400.

By appellee, as we have seen, it is contended that under the Negotiable Instruments Act (chapter 83, Laws of 1907) a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer, and that therefore it follows, as a matter of course, that upon the death of the depositor the bank is indebted to his estate to the amount of the deposit then on its books, and cannot therefore change its relation or its liability to the estate with the exception that it will be protected where it pays without notice of the death of the depositor. This contention arises by virtue of some confusion as to section 189 of the Negotiable Instruments Act, which, while providing that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer, is clearly designed for the protection of the bank, rather than a provision affecting the relation between the maker of the check and the payee. This is borne out by the fact that the latter portion of the section provides that the bank is not liable to the holder unless and until it accepts or certifies the check. We find his conclusion supported by Mr. Daniel in his work on Negotiable Instruments (section 1643), where he says:

"The provision of the statute [referring to negotiable instruments statute] that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank is a declaration of the rule that, as against the drawee bank, a check is not an assignment of the fund. But as against the drawer the giving of a check for value on an ordinary bank deposit should be considered an assignment of the fund pro tanto."

See, also, Raesser, Adm'r, etc., v. National Exchange Bank, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979. In this case the Supreme Court of Wisconsin held that, where a bank check works an assignment pro tanto of a fund on deposit, the death of the depositor will not revoke the authority of the bank to pay check which has been given for a valuable consideration, under circumstances which make it irrevocable as to the assignee. We believe that this statement of the law is controlling in the case under consideration, because we consider that the check given by the firm of M. B. Atkinson & Sons was an assignment pro tanto as between the maker and payee, and that section 189 of the Negotiable Instruments Act must necessarily be held to be a provision enacted for the purpose of protecting banks against loss which might be occasioned by the double payment of checks on deposit, and that its only intent and purpose is undoubtedly to protect banks only when they are acting in good faith, and not attempting to assist particular persons in the collection of their debts to the exclusion of others who are equally entitled to protection.

In the case of Hove v. Stanhope State Bank, 138 Iowa, 39, 115 N. W. 476, the Supreme Court of Iowa, in passing upon the same section on the Negotiable Instruments Code so held. See, also, section 1638, Daniel on Negotiable Instruments.

NOTE—*Check As An Assignment not Revoked by Death of Drawer.*—The case to which the instant case refers, Raeser v. N. Exch. Bank, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979, in holding that a check is a *pro tanto* assignment of a bank deposit of the drawer, reveals a forceful distinction between drafts and checks, as the latter are regarded in commercial usage. When the case, however, says that: "Before he is notified by any revocation, the banker will be protected by the check as an authority, without regard to the validity of the contract of assignment; after notice of revocation, the latter fact alone can protect him. He then pays at the peril of being able to establish

a valid and irrevocable contract of assignment. If that contract be otherwise, as, for example, obtained by fraud, so that the maker can rescind it, as against the payee, doubtless the banker who pays a check in defiance of a revocation can base no defense thereon," it seems to us, that the section of N. I. L. quoted would cut off any defense by a banker paying after notice of revocation.

Be that however as it may, it appears generally to be held, even in non-assignment states, that payment by a bank in mere ignorance of revocation, by death of drawer, is justified. As an illustration of cases of this kind is a case by New York Court of Appeals, in which the opinion was unanimous. Glennan v. Rochester Trust & S. D. Co., 209 N. Y. 12, 102 N. E. 537. It was said: "While there is paucity of judicial decisions on the subject, there seems to be absolute unanimity in the rule as declared by the leading text-writers, all asserting that while a bank should not pay a check after the death of the drawer, still a payment made in good faith, without knowledge of the death, or facts sufficient to cause inquiry, is a valid payment."

An interesting case with considerable annotation, as reported in L. R. A. (N. S.), is found as decided by Minnesota Supreme Court, wherein the bank appears to have paid, after knowledge of drawer's death. Wasgatt v. First Nat'l Bank, 117 Minn. 9, 134 N. W. 224, 43 L. R. A. (N. S.) 109. In this case it was held that the check amounted to an assignment *pro tanto* and the tracing of the old principle that it was not is spoken of as follows: "The rule that an order, bill of exchange or draft drawn by a creditor on his debtor for a part of the debt is not an assignment *pro tanto* rests upon the basis that the debtor cannot be subjected to several actions by different parties to recover portions of one debt. The rule is wholly for the protection of the debtor. When he consents to the splitting up of the debt, the basis for the rule disappears, whether the consent is in the form of an acceptance when the order or draft is presented or in any other form. The relation between a bank and its depositor is that of debtor and creditor. The bank agrees when the relation is created to pay the checks of the depositor when presented, whether drawn for the whole or a part of the deposit. It is the universal understanding between banks and their depositors arising from the customs of trade that the checks of the latter are to be paid upon presentation." There is an intimation in the opinion that the bank could not have successfully defended had the check been given as a *donatio causa mortis*, and it was said there was no evidence before the court establishing such, but: "The findings show a check given for a valuable consideration."

It also has been held in states which reject the assignment *pro tanto* rule, that a check for the exact amount on deposit may be regarded as an assignment. Philpot v. Temple Bkg. Co., 3 Ga. App. 742, 60 S. E. 480; Foss v. Lowell Five Cents Sav. Bank, 111 Mass. 285. In the latter case, the check being for the entire amount of the deposit, it was ruled there was an assignment, which was not revoked by death of the drawer.

In Kentucky, the court yielded to Negotiable Instruments Law and reversed former holdings that there was a *pro tanto* assignment. Weiand v. State Nat. Bank, 112 Ky. 310, 65 S. W. 617, 66 S. W. 26, 56 L. R. A. 178. Evidently the majority of this court, there being dissenting opinion by three of the seven members, did not take the view of the N. I. L. that the instant case does. The dissentients contended that if a check operated as an absolute assignment as between drawer and payee, no act of the former could deprive the latter of his right to the fund assigned. These members must have regarded N. I. L. as the instant case does.

There are many cases to the effect that where the check is given as a *donatio causa mortis* it must be presented in the lifetime of the drawer, upon the principle that such a check is worth nothing until acted on. A number of English cases have been cited to this principle. One American case is that of Simons v. Cinn. Sav. Bank, 31 Ohio St. 457, 27 Am. Rep. 521. It would seem that, if intention ought to govern in this matter, the solution of the question ought to be the other way. But in any event, the ignorance of drawee in paying the check ought to justify him.

C.

HUMOR OF THE LAW

"Well, my dear," said the head of the family, jubilantly, "I closed the deal for the new house to-day. I had the title examined, and found it perfectly clear. It cost me a hundred dollars for the examination, but—"

"Now isn't that a perfect shame!" interrupted his better half. "All that money wasted for nothing."

On a murder case in one of the southern states an old mountaineer was called as a witness. The defending lawyer was cross-examining him.

"You say you saw this murder committed?"

"Yes."

"How far were you from the spot where it took place?"

"'Bout a quarter of a mile."

"What time was it when this deed was done?"

"'Bout half past eight."

"On the date this murder was supposed to be committed it would be almost totally dark, and you mean to say you could see distinctly what happened at that time at a quarter of a mile distant?"

The old mountaineer shuffled his feet, changed his quid and stretched. "Oh, well," he said, as he started to leave the witness chair, "I don't give a gol darn about this trial anyway."—Everybody's Magazine.

WEEKLY DIGEST

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1. **Abatement and Revival**—Formal Revival.—A suit by one who dies may be continued by agreement in the name of his executor, though not formally revived.—Reynolds v. Carter, Miss., 68 So. 467.

2. **Accord and Satisfaction**—Bona Fide Dispute.—Retention and cashing by plaintiff of a check marked "in full settlement" held an accord and satisfaction between the parties, where their rights under the contract, from which defendant's liability, if any, arose, were bona fide in dispute.—Bartley v. Pictorial Review Co., Mo., 176 S. W. 489.

3.——Elements of.—Agreement to enter "Neither party" on promise to pay amount in settlement, which amount was not paid, held not an accord and satisfaction, since accord, without satisfaction, is no defense to action.—White v. Beverly Bldg. Ass'n, Mass., 108 N. E. 921.

4. **Admiralty**—Breach of Charter.—In suit for breach of charter party, amount of security to which libelant is entitled cannot be affected by a subsequent offer of the owners to furnish the use of the vessel.—The Aztec, U. S. D. C., 222 Fed. 169.

5. **Assault and Battery**—Instructions.—In a prosecution for assault with a dangerous weapon with intent to do bodily harm, the court should not instruct that accused must be convicted of the felony charged or acquitted, especially where the testimony raises the issue of simple assault.—Moody v. State, Okla., 148 Pac. 1055.

6.——Justification.—That defendant possessed a mortgage on mules in possession of prosecuting witness and was acting as agent of another to take them, afforded no justification for committing an assault and battery upon witness in his attempt to take them.—Wilkerson v. State, Ala., 68 So. 475.

7. **Attorney and Client**—Dual Service.—An attorney hired by two parties, to perform the same legal service, held to have right of action against each for the reasonable value of such services until paid by one.—Martin v. Henderson, Ala., 68 So. 478.

8. **Bankruptcy**—Beneficial Insurance.—Where insured may recall or change the designation of a beneficiary, and has the right to cancel or surrender the policy, surrender value held to pass to trustee in bankruptcy.—In re Jamison Bros. & Co., U. S. D. C., 222 Fed. 92.

9.——Concealment.—An intent to conceal his financial condition may be inferred from a bankrupt's failure to keep books, or proper books of account.—In re Linker, U. S. D. C., 222 Fed. 173.

10.——Courts.—There are no terms of court in bankruptcy, within the rule that orders may be vacated at any time during the term at which they are made.—In re Rochester Sanitarium & Baths Co., U. S. C. C. A., 222 Fed. 22.

11.——Foreclosure.—Foreclosure of mortgage on bankrupt's property held not to be delayed, unless sale by trustee free from incumbrances, within reasonable time, will produce enough to pay bondholders in full.—In re Progressive Wall Paper Corporation, U. S. D. C., 222 Fed. 87.

12.——Jurisdiction Implied.—While there is no express authority in the bankruptcy law for a sale of real estate free and clear of liens and incumbrances, such sales may be made, and a good title is thereby given.—In re Progressive Wall Paper Corporation, U. S. D. C., 222 Fed. 87.

13.——Preference.—Under Bankr. Act, § 60b, trustee held entitled to sue to recover value of property preferentially transferred though mortgage thereon had been foreclosed with the permission of the bankruptcy court.—Rosenthal v. Bronx Nat. Bank, U. S. D. C., 222 Fed. 83.

14. **Banks and Banking**—Cashier.—Where a bank cashier loaned money to be used in a joint enterprise of himself and the borrower, held that the borrower was liable on the note given by him therefor, notwithstanding the cashier's promise to hold him harmless.—Packers' Nat. Bank v. Rushart, Neb., 152 N. W. 789.

15.——Joint Depositors.—Where a wife's funds are deposited in the husband's name under an arrangement by which either the husband or wife can check against the account, consent of the wife that a check drawn by the husband's father on the fund might be paid by the bank was binding on the husband, in view of Rev. St. 1909, § 8309.—Craig v. Miners' Bank of Joplin, Mo., 176 S. W. 433.

16. **Bills and Notes**—Holder in Due Course.—A railroad company which received notes as

collateral for an existing debt and extended time of payment, without notice of an agreement of novation, held a bona fide holder in due course.—Shaffer v. Peavey, Wis., 152 N. W. 829.

17.——Payment.—A payment to the original payee of a note who had no authority from the transferee to accept payment, and did not have possession of the note, is no defense against the transferee, though he acquired the note after maturity.—Calhoun v. Ainsworth, Ark., 176 S. W. 316.

18. **Breach of Marriage Promise**—Invalidity of Marriage.—Under Rev. Laws, c. 145, §§ 8, 11, relating to guardianship for spendthrifts, to their contracts, and to discharge of guardians, held, that one under guardianship as a spendthrift could not make a valid contract to marry.—Sullivan v. Lloyd, Mass., 108 N. E. 923.

19. **Bribery**—Elements of.—Payment of money to a deputy sheriff to procure immunity from future arrest for violating the prohibition law constitutes "giving a bribe."—State v. La Flame, N. D., 152 N. W. 810.

20. **Brokers**—Forfeiture of Compensation.—Where an agent to sell property represents the purchaser without the consent of both parties, he forfeits his right to commission; but if he merely brings the parties together, he may recover compensation therefor.—American Security & Investment Co. v. Penney, Minn., 152 N. W. 771.

21. **Constitutional Law**—Jury Trial.—Attempt by creditor of husband, holding judgment on the husband's note representing liability for household goods, to levy execution on wife's realty under L. O. L. § 7039, held in contravention of the organic law, requiring a trial by jury before taking a citizen's property.—Dale v. Marvin, Ore., 148 Pac. 1116.

22.——Venue.—Venue in civil actions against corporations is not a vested right, but belongs to procedure or remedy.—Southern Ry. Co. v. Jordan, Ala., 68 So. 418.

23. **Contracts**—Condition Precedent.—Where a contract contemplates its execution by signing, either party has the right to insist upon the condition, and mere acts of performance on the part of one who has not signed it will not validate it.—Sparks v. Mauk, Cal., 148 Pac. 926.

24.——Election of Remedy.—One failing to make prompt election of remedies loses his right to rescind a contract in equity for fraud, and may sue only for damages for the deceit.—Central Life Ins. Co. v. Taylor, Ky., 176 S. W. 373.

25.——Rescission.—A court of equity will not rescind a contract when the parties thereto cannot be placed in statu quo, unless the clearest and strongest equity demands such relief.—United States v. Norris, U. S. C. C. A., 222 Fed. 14.

26. **Corporations**—Capital Stock.—Corporate directors who have impaired the corporation's capital stock by declaring dividends therefrom, though informed of its financial condition, may be compelled by the corporation to reinstate the capital, where the corporation is a going concern and not in liquidation.—Loan Society of Philadelphia v. Eavenson, Pa., 94 Atl. 121.

27.——Estoppel.—Where a corporation was organized by a committee appointed by subscribers to the stock of the company to be formed, defendant, who signed the susbcription contract, is estopped to deny his liability.—De Giverville Land Co. v. Thompson, Mo., 176 S. W. 409.

28.——Exchange of Property.—A corporation cannot, without unanimous consent of its stockholders, exchange its property for stock in another corporation, unless a disposition thereof was immediately necessary and an equal cash purchase could not be made.—Geddes v. Anaconda Copper Mining Co., U. S. D. C., 222 Fed. 129.

29.——Notice.—A corporation is charged with notice of facts which are communicated to its sole representative, though such representative is also acting for himself or adversely to the corporation.—Saratoga Inv. Co. v. Kern, Ore., 148 Pac. 1125.

30. **Customs and Usages**—Presumptions.—The presumption that a principal dealing in a market deals according to the customs of that market cannot be rebutted, where the person with whom he deals, without knowing that the other is ignorant of the usage, has performed the contract in accordance with the usage.—Miller v. Great Western Commission Co., Neb., 152 N. W. 737.

31. **Carriers of Goods**—Misdelivery.—In action against carrier for misdelivery of shipment, refusal of shipper to sell to original consignee, upon its offer to take the shipment, which had broken the original agreement, whereupon shipper had sold to other parties, held not occasion to apply rule of avoidable consequences.—St. Louis, I. M. & S. Ry. Co. v. Bliss-Cook Oak Co., Ark., 176 S. W. 325.

32. **Carriers of Passengers**—Derailment.—Proof of injury to a passenger from derailment of a train, and of the circumstances of the wreck, held to cast on the defendant carrier the burden of showing that it was not negligent.—Midland Valley R. Co. v. Hilliard, Okla., 148 Pac. 1001.

33.——Transfers.—An ordinance, restricting the use of street car transfers to persons to whom they were issued, held valid.—City of St. Paul v. Robinson, Minn., 152 N. W. 777.

34. **Damages**—Measure of.—The measure of damages for killing grass roots is the cost of reseeding, and the rental value, or decrease in rental value, till the grass is restored.—Jones v. Chicago, M. & St. P. R. Co., Mo., 176 S. W. 465.

35. **Deeds**—Description.—Where deeds purported to convey "all of section 30," or "an undivided half of section 30," such words of description were not to be cut down or modified by a recital of the number of acres contained therein.—Cecil v. Gray, Cal., 148 Pac. 935.

36.——Growing Crops.—A sale of land in possession of a tenant, and subject to the tenancy, does not pass a growing crop, and, in the absence of the deed from the record, the court will presume that it reserved the crop.—Davis v. Cramer, Mo., 176 S. W. 468.

37. **Descent and Distribution**—Claims.—Where a claim against a decedent's estate does not become enforceable until after the administration is closed, collection may be enforced by direct action in the district court against de-

cedent's heirs, to the extent of the assets received by them.—Chitty v. Gillett, Okla., 148 Pac. 1048.

38. **Divorce**—Alimony.—Where a husband defaults in paying alimony pendente lite, it is not an abuse of discretion for the court to refuse to proceed with the cause upon the merits until the husband complies with the order.—State v. Superior Court of King County, Wash., 148 Pac. 882.

39.——Pleading.—The libel for divorce is not bad because merely alleging a marriage, instead of a lawful marriage; but libelee, if desiring greater particularity of statement, must move for it.—Cole v. Cole, Me., 94 Atl. 120.

40. **Equity**—Decree Pro Confesso.—Where jurisdiction over some defendants does not appear, and a decree pro confesso is entered against other defendants answering, and the proceedings were not ex parte, a final decree against all defendants may be reversed.—Blocker v. Seay, Fla., 68 So. 459.

41.——Multifariousness.—A bill by the executrix of a deceased partner for an accounting, the cancellation of a contract between the partners, and the listing of the proceeds of an insurance policy as partnership assets held not multifarious.—Fried v. Burk, Md., 94 Atl. 86.

42. **Evidence**—Competency.—Conclusions of a motorman that plaintiff's horse did not appear frightened, and that he did not know it was frightened, was not warned by the driver, and there was no unusual noise, were admissible.—Partridge v. Middlesex & B. St. Ry. Co., Mass., 108 N. E. 918.

43.——Parol Agreement.—A written contract may be abrogated or altered by a parol agreement subsequently made, and proof of such subsequent agreement is not inadmissible as an attempt to vary a written instrument by parol evidence.—Lone Star Canal Co. v. Broussard, Tex., 176 S. W. 649.

44. **Executors and Administrators**—Decree.—Holder of mortgage on realty of estate, made by heir, held not concluded by decree of probate court licensing administrator to sell realty for distribution, since, not having been notified of the petition, the decree as to him was res inter alios.—Giles v. Kenney, Mass., 108 N. E. 940.

45. **Fish**—State Regulation.—Though defendants were entitled to fish in a river, that right does not entitle them to fish on the water submerging plaintiff's land.—Knudson v. Hull, Utah, 148 Pac. 1070.

46. **Food**—Offense.—One may not be convicted under the Food and Drugs Act, and the Sherley amendment thereto, merely because he advocates a theory of medicine which has not received the sanction of the medical profession.—United States v. American Laboratories, U. S. D. C., 222 Fed. 104.

47. **Fraud**—Elements of.—Representation by a cashier of a bank that the bank was indebted to a customer in a sum equal to a check received by the customer from a third person, drawn on another bank and deposited to the customer's credit, held not actionable fraud.—Gains v. Maspey, Mo., 176 S. W. 427.

48. **Fraudulent Conveyances**—Creditors' Bill.—In creditors' bill to set aside conveyance and for an accounting, an accounting cannot be had against codefendants, obtaining conveyance from grantee of debtor and reconveying to grantee, unless debtor's conveyance is set aside.—American Surety Co. of New York v. Conway, U. S. D. C., 222 Fed. 140.

49. **Homestead**—Continuous Occupation.—A homestead must be continuously occupied as such, though mere temporary residence elsewhere will not be an abandonment if there is an intention to return.—Purdy v. Melton, Ky., 176 S. W. 346.

50. **Highways**—Negligence.—That defendant speeded up his automobile in the belief that the heifer, afterwards struck by the machine, would pass him on one side did not show that he was negligent as a matter of law.—Armann v. Caswell, N. D., 152 N. W. 813.

51. **Indictment and Information**—Clerical Error.—That bullets was spelled "bullites" and premeditated "premediatted" did not, under Gen. St. 1906, § 3962, vitiate an indictment where the words were correctly spelled in other portions thereof.—Blackwell v. State, Fla., 68 So. 479.

52. **Insurance**—Employers' Liability.—Employers' liability insurer, withdrawing from defense on grounds that the only negligence in issue was one for which it was not liable, before determination of issue as to negligence for which it was liable, held not entitled to notice of amendment resting employe's recovery on negligence for which it was liable.—Murch Bros. Const. Co. v. Fidelity & Casualty Co. of New York v. Crowder, Mo., 176 S. W. 344.

53.——Fidelity Bond.—Where a bank complied with the promises made by it in an application for a bond insuring the fidelity of its cashier as to its supervision over him, the insurer cannot avoid liability on the ground that the usual and customary supervision was not exercised.—American Bonding Co. of Baltimore v. Ballard County Bank's Assignee, Ky., 176 S. W. 368.

54.——Physician's Report.—The report of the physician of insurer on personal examination of insured held competent to explain statement of a physician that insured died of tuberculosis, which he had when applying for insurance.—Clarkston v. Metropolitan Life Ins. Co., Mo., 176 S. W. 437.

55.——Rights Pending Suit.—To preserve his rights pending suit, insured need not continue paying premiums, where, from changed conditions, either the amount for which payments should be made or the effect of the payments is in dispute, but the rights of the parties should be adjudicated as of the time an action is instituted therefor.—Moore v. Life & Annuity Ass'n., Kan., 148 Pac. 981.

56. **Judgment**—Annulment.—The rule that a decree can be annulled only by bill of review or original bill, and not by a petition, does not apply in cases not heard on the merits, or where the circumstances necessitate relief, or where it was entered by mistake or surprise.—Galloway v. Galloway, Ind., 94 Atl. 97.

57.——Process.—A personal judgment rendered against a non-resident on service of citation, or non-resident notice, served on him without the state, is void.—San Barnardo Townsite Co. v. Hocker, Tex., 176 S. W. 644.

58.——Warrant of Attorney.—A judgment confessed under a warrant of attorney will be set aside where affidavits show prima facie a good defense on the merits, and application is made in apt time.—Richards v. First Nat. Bank of Ft. Collins, Colo., 148 Pac. 912.

59. **Landlord and Servant**—Attornment.—A landlord who had no title can recover the property from one to whom his tenant attorned, and who himself had no title, under the doctrine of tenant to question his landlord's title.—Richardson v. Houston Oil Co. of Texas, Tex., 176 S. W. 628.

60.——Repudiation of Lease.—Where the lessee's administratrix repudiates the lease and abandons the property, the lessor may obtain judgment, at once, for the entire rent due, and to become due, and enforce his privilege therefor and recover judgment for the balance.—Succession of Romero, La., 68 So. 433.

61. **Limitation of Actions**—Amended Petition.—Leave to file amended complaint embodying oral agreement barred by statute of limitations held not an abuse of discretion, where original complaint stating same cause of action set up written agreement not barred at time of filing.—Mackroth v. Sladky, Cal., 148 Pac. 978.

62. **Logs and Logging**—Delivery.—A person contracting to deliver logs should, in the absence of provisions to the contrary, provide all necessary means, such as roads and rollways, to enable him to complete the delivery.—Huber v. Blackwell Lumber Co., Idaho, 148 Pac. 903.

63. **Master and Servant**—Assurance by Master.—Where an employe is given definite orders to proceed with his work, he need not set up his judgment against that of his superior, but may rely on the latter's assurance that there is no danger.—Garrison v. Armstrong, Pa., 94 Atl. 125.

64.——Ejusdem Generis.—Under the doctrine of ejusdem generis, the term "other employes" in Act March 4, 1907, § 2, limiting hours of service of operators, train dispatchers, and other employes, does not include train conductors.—United States v. Florida East Coast Ry. Co., U. S. C. C. A., 222 Fed. 33.

65.——Employers' Liability Act.—A complaint for injuries by being crushed between a locomotive and a walkway held not demurrable under subdivision 5 of the Employers' Liability Act as not showing that the engineer knew of the peril, or that the moving of the locomotive was unusual.—Woodward Iron Co. v. Steel, Ala., 68 So. 473.

66.——Independent Contractor.—A contract for the prosecution of work, reserving to defendant the right to discharge men and the right to settle claims for damages, held to show that the person doing the work was not an independent contractor.—Muskogee Electric Traction Co. v. Hairel, Okla., 148 Pac. 1005.

67.——Liability.—A master is not liable for the death of a servant due to defects on the premises of third persons to which he sends his servant to work, unless he had knowledge of such defects.—Israel v. Lit Bros., Pa., 94 Atl. 136.

68.——Negligence.—If the leverman starts the drum in skidding logs, without signal from the flagman, contrary to rule for safety of the flagman, though not knowing his situation, the master is liable for the flagman's injury therefrom.—Bliss-Cook Oak Co. v. Mormon, Ark., 176 S. W. 305.

69.——Scope of Employment.—An employe injured by an explosion while men, acting with the permission of a co-employe, were preparing to explode powder not in furtherance of their work, held not entitled to recover from the employer.—Sherrill v. American Well & Prospecting Co., Tex., 176 S. W. 658.

70.——Vice-Principal.—Where the negligent act causing an employe's injury was that of a fellow-servant, but at the express direction of the assistant foreman, the negligence is attributed to the foreman, and through him imputed to the master.—Cincinnati, N. O. & T. P. Ry. Co. v. Gardner, Ky., 176 S. W. 351.

71. **Mortgages**—After-Acquired Property.—Mortgage on manufacturing plant, if sufficiently broad and explicit, held to cover chattels subsequently acquired and put into the plant as a part thereof, but not raw materials or goods made therefrom.—In re Progressive Wall Paper Corporation, U. S. D. C., 222 Fed. 87.

72. **Monopolies**—Statutory Construction.—Rev. St. 1909, § 10310, as to pleading agreements in restraint of trade or competition, held to apply to misuser of lawful right and also to acts wrong in themselves.—State ex inf. Barker v. Armour Packing Co., Mo., 176 S. W. 382.

73. **Municipal Corporations**—Bridges.—A city, which builds a bridge according to the plans of skillful engineers familiar with the locality, is not liable for damages resulting from the flooding of adjacent property because the bridge obstructed the outlet of the stream.—Wm. Tackaberry Co. v. Simmons Warehouse Co., Iowa, 152 N. W. 779.

74.——Civil Service Commission.—The civil service commission of cities of the first class should honor the requisition of the proper officials for the reinstatement of a police officer who has been dismissed and obtained a new trial on which he has been acquitted, where the mayor and director of public safety recommend his reinstatement.—Gallagher v. Blankenburg, Pa., 94 Atl. 132.

75.——Pedestrian.—Where a pedestrian was injured from falling from an embankment on which she chose to walk instead of in the properly graded traveled track below, held, that the town was not liable, though it had provided no sidewalks or guard rails at that point.—Marcus v. Town of Medford, Wis., 152 N. W. 816.

76.——Public Work.—In the absence of statute providing otherwise, a municipal corporation is not liable for negligence of its officers maintaining a dump constituting a public work.—Brunson v. City of Santa Monica, Cal., 148 Pac. 950.

77.——Special Assessment.—The Legislature may by express enactment or clear implication compel a public school to pay its share of the expenses of a local public improvement.—Thogmartin v. Nevada School Dist., Mo., 176 S. W. 473.

78.——Streets.—A city must exercise active vigilance to see that its streets are reasonably safe, but is not liable for injuries to traveler unless it had actual or constructive notice of defects.—Commissioners of Delmar v. Venables, Md., 94 Atl. 89.

79. **Names**—Idem Sonans.—"Boyce" and "Boise" are idem sonans, and the use of one in a notice under Gen. St. 1913, § 3148, prohibiting the selling of intoxicating liquors to an habitual drunkard, and of the other in the indictment, was not a fatal variance.—State v. Provencher, Minn., 152 N. W. 775.

80. **Navigable Waters**—Damnum Absque Injuria.—Where logs and flood wood are deposited upon the property of a riparian owner without fault of the one driving them in a navigable stream, the loss suffered by such owner is damnum absque injuria.—Boutwell v. Champlain Realty Co., Vt., 94 Atl. 108.

81. **Negligence**—Insurer.—While the proprietor of a swimming pool is not an insurer of the safety of his patrons, nevertheless he is liable for negligence in failing to warn them of an insufficient depth of water in the pool to permit diving with safety.—Johnson v. Hot Springs Land & Improvement Co., Ore., 148 Pac. 1137.

82. **Partnership**—Dissolution.—In suit on a note executed by defendant's partner in real estate brokerage business subsequent to dissolution of the firm, judgment for plaintiff held improper, in absence of showing of maker's authority from defendant to execute the note.—Shaw v. Gunby, Mo., 176 S. W. 548.

83.——Surviving Partners.—Surviving partners are quasi trustees for the personal representatives of the deceased partner, and equity can therefore require them to account, without reference to the ordinary doctrine of accounting.—Fried v. Burk, Md., 94 Atl. 86.

84. **Perpetuities**—Restraint on Alienation.—A provision of a will, forbidding division of testator's estate for a reasonable time definitely fixed by testator held not a void restraint on alienation nor a limitation repugnant to the fee.—Peterson v. Damoude, Neb., 152 N. W. 786.

85. **Physicians and Surgeons**—Malpractice.—If the condition of plaintiff, in an action for malpractice, was the result of his own negligence in failing to take proper care of himself by attempting to treat the injury himself, defendant physician was not liable.—Dunman v. Raney, Ark., 176 S. W. 339.

86. **Principal and Agent**—Implied Authority.—An agent who is given authority by the holder of a note to collect the interest thereon has no authority because of that fact to accept payments on the principal.—Calhoun v. Ainsworth, Ark., 176 S. W. 316.

87.——Knowledge of Agent.—The rule that a principal is charged with matters known to the agent does not apply where the agent is acting fraudulently as to his principal.—Saratoga Inv. Co. v. Kern, Ore., 148 Pac. 1125.

88.——Ratification.—Where plaintiff furnished plans to church building committee acting in excess of its authority, the church's payment of part of the contract price did not make the committee personally responsible, but if made with knowledge of their excess of authority was a ratification relieving the committee from personal liability.—Swearingen v. C. W. Bulger & Son, Ark., 176 S. W. 328.

89. **Receivers**—Appeal and Error.—A United States court, appointing receivers of a corporation and permitting a mortgagee to sue, will not restrain one of the receivers from appealing alone from adverse decree of a state court.—Goodman Mfg. Co. v. Pittsburg-Buffalo Co., U. S. D. C., 222 Fed. 144.

90. **Sales**—Consideration.—Where the parties to a contract requiring delivery of an automobile agreed to substitute a different automobile, there was no failure of consideration if the substituted automobile was delivered within a reasonable time after the substitution

agreement.—American Mfg. Co. v. Helena Hardware Co., Ark., 176 S. W. 306.

91.——Counterclaim.—In action for breach of warranty wherein defendant counterclaimed on completion of secondary contract made in satisfaction of plaintiff's claim, failure to produce evidence of such a claim did not preclude recovery on the counterclaim or a litigation of plaintiff's claim.—Boutin v. Andreas, Wis., 152 N. W. 822.

92.——Damages.—A party who has failed to perform in full his contract to deliver logs may recover compensation for the logs delivered, according to the contract price, less damages caused by his failure to complete the contract. —Huber v. Blackwell Lumber Co., Idaho, 148 Pac. 903.

93.——Implied Warranty.—A buyer of strawberries held entitled to assume that he was buying berries produced in the vicinity of the place of business of the seller, and inspected by the inspector named by the seller.—Woldert Grocery Co. v. Pillman, Mo., 176 S. W. 457.

94.——Rescission.—Where a purchaser has kept machinery for two years without offering to return it, and has made monthly payments on the purchase price, he has lost the right to rescind the contract for breach thereof.—Meek Coal Co. v. George D. Whitcomb Co., Ky., 176 S. W. 354.

95.——Waiver.—Breach by defendant brewing company of contract for sale of beer by refusing to take back empty bottles at a stated price held not waived by plaintiff brewing company by its having continued to order shipments of beer.—Royal Brewing Co. v. St. Louis Brewing Ass'n, Mo., 176 S. W. 553.

96.——Warehouse Receipts Act.—Under Warehouse Receipts Act, § 9, the delivery and acceptance of an order for goods incapable of delivery, signed by the holder of a non-negotiable warehouse receipt therefor, is a symbolical delivery of the goods.—Lewis-Simas-Jones Co. v. C. Kee & Co., Cal., 148 Pac. 973.

97. **Sheriffs and Constables**—Writ of Justification.—Writ of attachment and execution, regular on their face, held to protect constable, though he was notified of defects and irregularities in connection therewith.—Owls' Nest v. Haines, Mo., 176 S. W. 513.

98. **Shipping**—Liability of Charterer.—Where a water craft is chartered and not returned, or returned in a damaged condition, the charterer's liability is determined by the law of bailment, as he becomes a bailee.—Parker v. Washington Tug & Barge Co., Wash., 148 Pac. 896.

99. **States**—Suspension of Officer.—The Governor has power, immediately on suspension of an officer, to appoint someone to perform the duties of the office until a reinstatement of the officer, or an adjournment of the Senate sitting next thereafter.—In re Advisory Opinion to Governor, Fla., 68 So. 450.

100. **Street Railroads**—Negligence.—The mere ringing of the gong on a street car, whereby a horse was frightened, is not negligence, unless it was unusual, or was continued after the motorman knew or ought to have known that the horse was frightened, or was in wanton disregard of plaintiff's safety.—Partridge v. Middlesex & B. St. Ry. Co., Mass., 108 N. E. 918.

101. **Taxation**—Hospitals.—Hospital held a public charity and exempt from taxation as such, though some patients able to pay were charged more than the actual cost of their care and treatment.—City of Dayton v. Trustees of Speers Hospital, Ky., 176 S. W. 361.

102.——Redemption.—Where, on account of the tax collector's mistake, taxes for any year are refused when tendered by the owner, he is entitled to redeem the land, if sold for nonpayment.—Fleischer v. Wappanocca Outing Club, Ark., 176 S. W. 312.

103. **Theaters and Shows**—Negligence.—The operator of a scenic railway in an amusement park is bound to exercise the highest care and caution for the safety of its passengers, the same as would a common carrier.—Best Park & Amusement Co. v. Rollins, Ala., 68 So. 417.

104. **Tenancy in Common**—Agency.—The relation between tenants in common does not imply any agency, on the part of the tenant in possession for his co-tenants, as to receipt of notice of outstanding claims affecting title. —In re Safe Deposit & Trust Co. of Baltimore, Md., 94 Atl. 93.

105.——Ouster.—In order for a tenant to show an ouster of his co-tenant, he must show acts of possession inconsistent with, and exclusive of, the co-tenant's rights, and knowledge by the co-tenant of his claim of exclusive ownership.—Stokely v. Conner, Fla., 68 So. 452.

106. **Trade-Marks and Trade-Names**—False Representations.—The maker of an article, who makes false representations to the public in respect to it in his advertisements, has no standing in equity to maintain a suit to protect a trade-mark under which it is sold.— Channell Chemical Co. v. E. W. Hayden Co., U. S. D. C., 222 Fed. 162.

107. **Trespass**—Reclamation. — Where logs driven in a navigable stream are washed upon adjoining land without the fault of those in charge, such persons are entitled to enter upon the lands to reclaim their property and are not liable where they exercise proper care.—Boutwell v. Champlain Realty Co., Vt., 94 Atl. 108.

108. **Trusts**—Estoppel.—A cestui que trust held estopped to demand the legal title as against a third person to whom the trustee, with her acquiescence, had conveyed the land by a deed absolute in form like that to the trustee, though the third person took with knowledge of the existence of a parol trust.— Chandler v. Roe, Okla., 148 Pac. 1026.

109. **Vendor and Purchaser**— Option. —An offer of a lower price for land held not a refusal to take at the option price, so as to terminate the option.—Baxter v. Calhoun, U. S. D. C., 222 Fed. 111.

110.——Rescission.—The fact that land, which the vendor agreed to convey free of incumbrances, was covered by a trust deed, which did not mature until after the time set for the conveyance, does not authorize the purchaser to rescind the contract.—Pioneer Gold Mining Co. v. Price, Mo., 176 S. W. 474.

111.——Waiver.—Where a vendor, who retains the legal title, proceeds at law for the purchase price, he does not waive his right to proceed against the property to subject it to a lien for sums paid after the contract to preserve the property.—Ehrhart v. Mahony, Cal., 148 Pac. 934.

112. **Waters and Water Courses**—Drainage. —Where defendants were within their rights in ditching their lands to facilitate the natural drainage, and thereby imposed no heavier burden on the adjoining estate than it was otherwise bound to bear, the owner of such estate had no cause of action for damages.—Marable v. Barhan, La., 68 So. 440.

113.——Floods.—Those building a bridge over a stream are not bound to guard against unprecedented floods, although they must provide for ordinary high waters.—Wm. Tackaberry Co. v. Simmons Warehouse Co., Iowa, 152 N. W. 779.

114.——Nuisance.—Under Comp. St. 1910, § 825, dam built, deviating from plans approved by state engineer, so that water was set back upon a near-by railroad, seriously endangering its operation in times of freshet, held a public nuisance, open to abatement on suit of the state. —Big Horn Power Co. v. State, Wyo., 148 Pac. 1110.

115.——Riparian Rights.—Riparian owners held to absolutely own non-navigable or nonpublic ponds and lakes, or lakes formerly public or navigable, which have permanently changed in character.—Flisrand v. Madson, S. D., 152 N. W. 796.

116. **Wills**—Testamentary Capacity. — That testator committed suicide and left his property away from his mother and brothers held proper for consideration on the issue of testamentary capacity.—In re Wasserman's Estate, Cal., 148 Pac. 931.

117. **Witnesses**—Competency.—The husband of a deceased grantor of land who was incompetent to testify in his own behalf as to the nature of the grantee's possession, held incompetent to testify in favor of another heir of his wife, though releasing all his rights to another.—Williams v. Harris, Miss., 68 So. 465.